

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



UNITED TEACHERS OF LOS ANGELES,

Charging Party,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4504-E

PERB Decision No. 1765

May 3, 2005

Appearances: Geffner & Bush by Kathleen M. Jorgenson, Attorney, for United Teachers of Los Angeles; Paul, Hastings, Janofsky & Walker by Robert F. Walker, Attorney, for Los Angeles Unified School District.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by United Teachers of Los Angeles (UTLA) of a Board agent's dismissal of its unfair practice charge. PERB deferred UTLA's previous charge, Case No. LA-CE-4425-E, which alleged a unilateral change in class size, to the parties' grievance and arbitration procedure. In the present charge, UTLA alleges that the arbitration award resulting from the prior case is repugnant to the purposes of the Educational Employment Relations Act (EERA).¹ The Board agent dismissed the charge finding that the arbitration award was not repugnant.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the Los Angeles Unified School District's (District) position statement, the Board

¹EERA is codified at Government Code section 3540, et seq.

agent's warning and dismissal letters, UTLA's appeal and the District's response to the appeal. Based on the discussion below, the Board affirms the dismissal of UTLA's charge.

BACKGROUND

On April 30, 2002, the District decided to increase class size effective July 1, 2002. The District announced the change in a bulletin issued on May 20, 2002.

UTLA and the District are parties to a collective bargaining agreement (CBA) which includes a provision regarding class size. Article XVIII sets forth the class size criteria for the various grade levels and programs. Article XVIII, section 1.5, further states:

It is recognized that the class size restrictions of this Article may not be achieved due to circumstances such as state funding limitations, teacher shortages, changes in the student integration or other programs, or statutory changes.

On June 18, 2002, UTLA filed unfair practice charge, Case No. LA-CE-4425-E, alleging that the District unilaterally increased class size without providing notice and an opportunity to bargain. On August 9, 2002, a Board agent dismissed the charge and deferred the matter to the parties' grievance procedure which culminated in binding arbitration.

UTLA filed a grievance alleging that the District breached the class size provisions set forth in the CBA. UTLA also alleged that by the same conduct the District violated EERA. The parties participated in an evidentiary hearing before a three-member arbitration panel in December 2002. The arbitration panel issued its decision and award on March 13, 2003.

The arbitration panel found that the District had exceeded the contractual class size limits in some cases. The panel then evaluated whether the "state funding limitations" in section 1.5 authorized the District to exceed the class size restrictions. The parties submitted evidence of the District's budget shortfalls and fiscal decisions. The panel concluded that the District did not violate the CBA when it increased class size based on state funding limitations.

Finally, the arbitration panel determined that it did not have jurisdiction under the CBA to decide statutory violations of EERA.

The instant charge was filed with PERB on April 9, 2003, alleging that the arbitration award is repugnant to the purposes of EERA. UTLA alleges that the arbitration panel erroneously concluded that under section 1.5, UTLA waived its right to bargain class size changes in circumstances when state funding limitations are at issue. The charge also alleges the decision is repugnant because the panel "failed to consider the unfair labor practice at issue."

DISCUSSION

When an arbitration award covers the subject of an unfair practice charge, a post-arbitration repugnancy review is conducted to determine whether the charge must be dismissed and deferred to the arbitration award. EERA section 3541.5(a)² grants the Board the discretion to review an arbitration award to determine whether it is repugnant to the purposes of EERA. In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a (Dry_Creek),

²EERA section 3541.5 states, in pertinent part:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:

(2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . . The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge. [Emphasis added.]

PERB adopted the National Labor Relations Board's (NLRB) post-arbitration deferral standard in Spielberg Manufacturing Company (1955), 112 NLRB 1080 [36 LRRM 1152]. Under Dry Creek, the Board will exercise its discretion to defer to an arbitration award if: (1) the matters raised in the unfair practice charge were presented to and considered by the arbitrator; (2) the arbitral proceedings were fair and regular; (3) all parties to the arbitration proceedings agreed to be bound by the arbitral award; and (4) the award is not repugnant to the purposes of EERA.

The NLRB further explained in Olin Corp. (1984) 268 NLRB 573, 574 [115 LRRM 1056] (Olin Corp.):

We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. [Fn. omitted.] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is 'clearly repugnant' to the Act. . . . Unless the award is 'palpably wrong,' [Fn. omitted.] i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

The Board adopted the Olin Corp. standard in San Diego County Office of Education (1991) PERB Decision No. 880 (San Diego COE). (See also, Yuba City Unified School District (1995) PERB Decision No. 1095 (Yuba City).)

The party seeking to have the Board reject deferral to the arbitration award has the burden of showing that the deferral standard has not been met. (San Diego COE; Olin Corp.)

On appeal, UTLA contends the arbitration award is repugnant to EERA because the arbitration panel failed to consider its statutory claims.

The Board has previously addressed the parallel between contractual and statutory claims in cases alleging repugnancy of arbitration awards. In Los Angeles Unified School District (1982) PERB Decision No. 218 (Los Angeles), the union alleged that the district

unilaterally changed the bus parking locations, which impacted bus drivers by changing the locations where they reported to work. The arbitrator found the contract authorized the changes made by the district. Thus, the district did not unilaterally change the policy set forth in the parties' contract. The Board stated, "In this case, the arbitral and statutory issues are clearly parallel; both turn on whether the District had the right to unilaterally change the bus parking locations."

In Fremont Unified School District (1994) PERB Decision No. 1036, the union charged that the district unilaterally changed the observation date for Veterans' Day. The union asserted that it had a statutory right under EERA to negotiate the school calendar independent of the collective bargaining agreement which provided for a Veterans' Day holiday. The Board deferred to the arbitrator's award, finding the contractual issue clearly parallel to the statutory issue raised in the unfair practice charge. The Board also concluded that the union had failed to demonstrate that the arbitrator's award was "clearly repugnant" or "palpably wrong."

Furthermore, in Yuba City, the union alleged that the district unilaterally increased teacher instructional time. The arbitrator concluded that the provisions of the parties' contract authorized the district to increase instructional time. As in the present case, the arbitrator expressly declined to rule on any unfair labor practice issues. The Board stated that the arbitrator's refusal to decide unfair practice issues was "not dispositive of the Board's exercise of its jurisdiction under EERA." Rather, the Board held the Dry Creek deferral standard to be the appropriate test, finding that the facts necessary for resolving both the contractual and statutory issues were identical.

In its unfair practice charge, UTLA alleges that the District unilaterally increased class size. This is the same issue presented to the arbitration panel. Based on the evidence presented at the arbitration hearing, the panel determined that section 1.5 excused the District

from adhering to the class size limitations. The facts considered by the arbitration panel, including the interpretation of the applicable contract provisions, are identical to those facts relevant to resolving an unfair practice charge before PERB alleging that the District unilaterally changed the class size policy. Clearly, the issues raised in UTLA's charge have been presented to and considered by the arbitration panel. This satisfies the first prong of the Dry Creek standard.

Second, UTLA makes no claim that the arbitral proceedings were not fair and regular. Third, the parties agreed to be bound by the arbitral award.

Finally, it is unnecessary for the Board to determine whether UTLA waived its right to bargain changes in class size under section 1.5. The arbitration panel concluded there was no unilateral change in policy when the District acted in accordance with its authority under the contract to change class size. UTLA has failed to establish that the arbitrator's award is clearly "repugnant" or palpably wrong, i.e., not susceptible to an interpretation consistent with EERA. Thus, the Board will not substitute its judgment for that of the arbitrator. (Oakland Unified School District (1985) PERB Decision No. 538; Los Angeles.)

The arbitration panel fully considered the evidence presented by the parties. There is nothing in the arbitration award which indicates that it is repugnant to the purposes of EERA. Therefore, the Board defers to the arbitration award and dismisses the charge.

ORDER

The unfair practice charge in Case No. LA-CE-4504-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.